No. 82-1583

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

S/S COVE RANGER, her engines tackle, boilers, equipment, furnishings *in rem*, COVE SHIPPING COMPANY, INC., C. M. C. TANKERS and C. T. S. ASSOCIATES, *in personam*,
Petitioners,

v.

ST. GEORGE PACKING COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT, ST. GEORGE PACKING COMPANY, INC., IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO DETERMINE WHETHER THE RULE STATED IN *THE STEAMSHIP PENNSYLVANIA v. TROOP*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874), CONTINUES TO BE THE LAW OF THE SEA WHERE (1) THAT RULE, IN ORDER TO BE INVOKED, REQUIRES THE VIOLATION OF A COLLISION-AVOIDANCE STATUTE, AND (2) THE DISTRICT COURT ON UNDISPUTED EVIDENCE DETERMINED THAT THERE WAS NO STATUTORY VIOLATION, WHICH DETERMINATION WAS AFFIRMED BY THE COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW?

PARTIES OF INTEREST

The following listed persons and entities have an interest in the decision of this case.

S/S COVE RANGER*

C. M. C. TANKERS*

COVE SHIPPING COMPANY, INC.*

C. T. S. ASSOCIATES*

ST. GEORGE PACKING COMPANY, INC.*

PENINSULAR FIRE INSURANCE COMPANY

WILLIAM D. SHEPPARD

REINO A. TASKINEN

JON TASKINEN

THE WEST OF ENGLAND (LUXEMBOURG)

WORLD WIDE MARINE INSURERS, INC.

*The actual parties to this action as listed in the caption of the case in this Court.

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STATUTORY PROVISION

This litigation involved the correctness of the District Court's determination of no statutory violation of Rule 5, International Regulations for Preventing Collision at Sea (1972), 33 U.S.C. §1602:

> Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

STATEMENT OF THE CASE

Course of Proceedings Below

Respondent, St. George Packing Company, Inc., owner of Shrimp Trawler LARRY AND MABEL II, brought an action in admiralty for damages stemming from a maritime collision in the United States District Court for the Middle District of Florida, Tampa Division, against Petitioners here, S/S COVE RANGER, *in rem*, and Cove Shipping Company, Inc., *in personam*. (R. 1).[1] The pleadings were subsequently amended with the addition of Petitioners here, C. T. S. Associates and C. M. C. Tankers, as party Defendants. (R. 28, 30). C. T. S. Associates' counterclaim for wrongful arrest of the S/S COVE RANGER was dismissed by the District Court during trial (TR. 159-165), and an Order confirming dismissal was subsequently entered. (R. 62).

Respondent's claim was tried in Tampa, Florida, on March 5 and 6, 1981 (R. 63), before the Honorable Joseph P. Willson, in admiralty, without a jury. The respective parties submitted post-trial memoranda together with proposed findings of fact and conclusions of law. (R. 54, 55). The District Court, on May 15, 1981, entered its Memorandum findings of fact and conclusions of law determining that S/S COVE RANGER was solely at fault for the collision. (R. 56; PA. 4a-16a). Judgment order was entered accordingly. (R. 57).

1/ References are to the Record (R.) as paginated in the Court of Appeals. (TR.) = Trial Transcript (R. 63) separately paginated. Plaintiffs' trial exhibits (PX.) were not independently numbered in the Record. (PA.) = Appendix to Petition for Writ of Certiorari; (RA.) = Appendix to this Brief in Opposition.

Appeal was taken to the United States Court of Appeals for the Eleventh Circuit by notice filed June 15, 1981. (R. 59). The Circuit Court affirmed the judgment without oral argument and without an opinion under Eleventh Circuit Local Rule 25.[2] (PA. 3a).

A Petition for Rehearing and Suggestion for Consideration En Banc were denied on December 28, 1982. (PA. 1a - 2a).

Statement of the Facts

Petitioners avoid the facts as found by the District Court and affirmed by the Eleventh Circuit (PA. 4a - 16a) in favor of an incomplete, erroneous and selective combing of the testimony and findings of the District Court.

The collision occurred approximately 30 nautical miles west of Dry Tortugas. The time of and position of the collision and the fact that LARRY AND MABEL II was a constructive total loss were stipulated. (R. 56; PA. 4a - 5a). The finding of fault on behalf of the S/S COVE RANGER is not at issue.

LARRY AND MABEL II was a wooden hulled shrimp trawler 78 feet in length. PX. 7 and 8 (TR. 33-34; RA. 1-2) depict photographs of a shrimp trawler named TOM AND BOBBIE which is identical in size, construction and configuration to LARRY AND MABEL II. (TR. 14-15, 20-21). LARRY AND MABEL II was in the charge of Captain William B. Sheppard and two crewmen, Reino and Jon Taskinen, returning from the fishing grounds in Contoy, Mexico, to Ft. Myers, Florida. She was traveling in the company of the shrimp trawler DEBBIE

2/ Rule 25, as applicable to this case, provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

* * *

and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

AND ADDISON which was positioned on the port beam of LARRY AND MABEL II approximately ¾ to one mile distant. (R. 14-16).

COVE RANGER is a 29,000 ton tank ship 654 feet in length and 78 feet in beam propelled by a 12,500 horsepower steam turbine. (TR. 88). On the morning of March 16, 1981, she had passed abeam Dry Tortugas at 0819 hours and set a gyro course of 280 degrees toward Corpus Christi, Texas (TR. 181), making a full ahead speed of 16.2 knots. (TR. 92, 97).

The watch on board COVE RANGER consisted of Michael Power, the Third Mate (TR. 90, 180), and an able bodied seaman. (TR. 182). On the morning of the collision Mr. Power was beginning only his thirty sixth day as an officer in charge of the watch on a seagoing vessel. (TR. 193). Mr. Power's duty as Third Mate included using all means available to him to keep COVE RANGER from risk of collision. (TR. 106). By standing orders of the Master of the COVE RANGER, Captain Flannagan, Mr. Power was charged with giving "all traffic a wide berth" (TR. 95), and sounding the danger signal for small vessels approaching within one-half mile of COVE RANGER. (TR. 207).

LARRY AND MABEL II was encountering northeast winds of 25 miles per hour and rough northeasterly seas of 6 to 8 feet. (TR. 17). As a result she was pitching into the seas, rolling, and taking water over the bow and over the wheelhouse. The wind was from the starboard bow. (TR. 17-18). Captain Sheppard had reduced speed making 6 to 8 miles per hour and had employed stabilizers[3] in an attempt to stabilize the boat. (TR. 18-19, 72). Captain Sheppard took over the watch in the wheelhouse at 0700 (TR. 20) and remained on watch in the wheelhouse until collision. (TR. 58).

3/ A stabilizer is a triangular shaped piece of metal pinned in the middle and with a nose weight. It is placed into the water by a chain at the end of the extended trawler outriggers. (see RA. 2). (TR. 18-19).

LARRY AND MABEL II was being steered by her auto pilot (TR. 27, 58). The auto pilot could be disengaged and the throttle pulled back within a second, and the trawler's headway could be stopped in less than a minute under existing weather conditions. (TR. 27-28). Captain Sheppard was standing lookout in the trawler's wheelhouse at the starboard window, which is the window position just over the "T" in the word TOM on PX. 8. (RA. 2). Captain Sheppard had a clear view to port and ahead, but with the constant shipping of water, the spray and the glare of the sun, visibility off the starboard bow of the trawler was difficult. (TR. 22-23). To maintain lookout to starboard Captain Sheppard continuously lowered the starboard window when the vessel was riding up a wave, and closed it when the vessel's bow once again plunged into a wave, approximately every ten seconds. (TR. 25, 53-54).

Captain Sheppard did not call out one of the crew members to act as a forward lookout on the bow or atop the wheelhouse because of the dangers presented by the sea conditions. The water was going from the bow of the boat all the way across the wheelhouse and along the entire starboard side of the trawler. (TR. 25-26, 55-57). Under existing conditions the lookout to starboard that Captain Sheppard was keeping from the wheelhouse was the best that could have been kept even if a crewman had been posted elsewhere on the vessel. (TR. 57). The trawler's wheelhouse was well foreward (RA. 1-2), and Captain Sheppard's position was only 12 feet or so aft of the bow where an outside lookout would ordinarily be placed. (TR. 25-26). Reino Taskinen confirmed that in the prevailing conditions it would have been dangerous, if not impossible, to post someone on top of the pitching wheelhouse because there was "...nothing to hang onto and the seas were going completely over the top of the wheelhouse." (TR. 80-82).

Third Mate Power aboard COVE RANGER sighted LARRY AND MABEL II and the DEBBIE AND ADDISON a full 20 minutes before collision. (TR. 82). By inspection with binoculars Mr. Power determined that LARRY AND MABEL II

was running into head seas and a northeasterly wind on a course of about 025 degrees at an estimated speed of 5 to 6 knots. (TR. 183). He knew the difference between trawler outrigger position while fishing and while using stabilizers, and determined that LARRY AND MABEL II and the DEBBIE AND ADDISON were not fishing. (TR. 182-183). Mr. Power observed no one on their decks and admitted that he observed they were taking a "lot" of spray. (TR. 192).

Rather than determining if risk of collision existed by actual visual bearings of the approaching vessels (TR. 105-106, 138-140) with COVE RANGER'S gyro repeaters and azimuth circles (TR. 93), Mr. Power continued to watch the fishing vessels by "lining them up" with a window frame on the tanker's bridge and "estimating" that their bearings were changing slightly to the left by about one or two degrees. (TR. 185-186). At some point Mr. Power said one of the trawlers passed across the bow of COVE RANGER and he continued to watch the other trawler approach and, on the basis of his "experience at sea" (TR. 188-189), he expected that it would "get close in" (TR. 187) before it turned to "drop under" the stern of COVE RANGER. (TR. 190-192).

At 0958 hours (18 minutes after the fishing vessels were first sighted) Mr. Power became alarmed and ordered the rudder of COVE RANGER hard right. (TR. 190). The effect of this maneuver was to pivot the COVE RANGER, throwing the side of the ship into the shrimp trawler in a crabbing motion. (TR. 154-156). Mr. Power did not blow any whistle signal at that time because "I forgot. I was in an excited state." (TR. 191, 196). Mr. Power admitted there was nothing preventing him from blowing a danger signal as early as 0940, or at any time prior to collision. (TR. 196). Captain Flannagan, Master of COVE RANGER, agreed that the shrimp vessel could have taken a number of actions to avoid collision had a danger signal been given by COVE RANGER even as late as 4 minutes prior to the accident. (TR. 99).

Captain Sheppard had kept the trawler's radio tuned to channel 16 except for brief radio reports and hourly checks with DEBBIE AND ADDISON. (TR. 25, 61-62). Mr. Power stated that he did not try to radio the vessels because, based on his "experience," fishing vessels never answered channel 16. (TR. 188-189). Captain Sheppard received no radio call and there was no whistle signal prior to his sighting COVE RANGER just prior to collision. (TR. 29-30). He called a warning to his crew (TR. 73) and immediately placed the trawler in reverse. (TR. 30, 74). The trawler was backing down when the end of the trawler's starboard outrigger was hit by the ship and the trawler's bow was swung to the right into the COVE RANGER'S side. (TR. 30-31).

Accepting the evidence above stated, as outlined in the post-trial brief and summary adopted by the District Court as the Appendix to its Memorandum decision (PA. 7a - 8a, 10a - 14a), the District Court rejected the Petitioners' contention that Rule 5, 33 U.S.C. §1602 (*supra*, p. 1) had been violated:

> Based upon all the evidence in this case, however, it was my conclusion at the trial that the failure to post a lookout was excusable but that the failure of the Third Mate on the S/S Cove Ranger to sound a danger signal and to give a one blast signal thereafter was the sole and proximate cause of the disaster. It is, of course, true that the vessels were in the traffic shipping lane on a bright clear day, but the construction and size of the trawler moving in heavy seas with a constant spray over her bow was ample reason for the lack of a lookout. A lookout on the trawler would have been in a dangerous position during the interval prior to the collision. (PA. 7a).

The Lookout Issue in the District and Circuit Courts

The present Petition is predicated upon the assertion that the District Court found "...that the *Respondent* had failed to post a lookout at the time of the collision." (Petition, p. 6). The issue with respect to the LARRY AND MABEL II was not a *failure* to post a lookout, nor did the District Court find a failure

to post a lookout. The issue was the appropriateness of the lookout kept by Captain Sheppard of LARRY AND MABEL II under the sea conditions existing at the time. (PA. 5a - 7a, 13a - 14a).

As confirmed by the memorandum summary by Respondent's Counsel, adopted by the District Court "...as being a correct summary of the evidence and conclusions..." (PA. 7a), the District Court's statement that "...the failure to post a lookout was excusable..." (PA. 7a) was but a reference to the position of Captain Sheppard under existing sea conditions within the requirements of Rule 5, 33 U.S.C. §1602. (*Supra*, p. 1). (PA. 7a, 13a - 14a). As stated therein and accepted and adopted by the District Court:

> The fact is LARRY AND MABEL II did have a lookout and that lookout, Captain Sheppard, was positioned and keeping the best lookout which the existing circumstances permitted. (PA. 14a).

The initial Brief of the Appellants in the Eleventh Circuit had posited the lookout issue as follows:

> WHETHER THE F/V LARRY AND MABEL II WAS REQUIRED TO MAINTAIN A PROPER LOOKOUT AT ALL TIMES IRRESPECTIVE OF THE SEA AND WEATHER CONDITIONS. (Brief of the Appellants, pp. 5, 10).

Petitioners' argument as Appellants in their initial Brief, in one page (Brief of Appellants, p. 10), was that the District Court's determination that "...a lookout on the trawler would have been in a dangerous position during the interval prior to the collision" (PA. 7a) was clearly erroneous under the requirements of Rule 5, 33 U.S.C. §1602 (*supra*, p 1), which Petitioners argued required posting of an outside lookout regardless of the prevailing circumstances.

The assertion in the Petition that the District Court in fact determined that there was a failure to post a lookout is exactly

contrary to the admission in the Petitioners' Reply Brief in the Eleventh Circuit, at page 2:

> . . . the District Court concluded that the LARRY and MABEL II had kept a proper lookout under all the circumstances, and assigned the COVE RANGER sole fault in the collision for failing to earlier take evasive action and to sound a danger blast and other signals.

Abandoning the factual contentions and arguments asserted in their initial Brief in the Eleventh Circuit, the Petitioners, in their Reply Brief, asserted the *PENNSYLVANIA* Rule[4] for the first time, not as an issue of fact, but as an issue of law supposedly to be applied to the facts as found by the District Court. Page 4 of that Reply Brief stated:

> Appellants do not argue, however, that the District Court's findings of facts relating to the events preceding and during the collision are without support in the Record.

4/ *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874).

SUMMARY OF ARGUMENT

Contrary to the claim of the present Petition, neither the District Court nor the Eleventh Circuit Court of Appeals has stated that the evidentiary and procedural rule of *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.), 125, 22 L.ed. 148 (1874), does not continue to be the law of the sea. The conflict asserted by Petitioners does not exist. This Court historically does not sit as a trier of fact to resolve disputes of interest only to the parties involved. The present Petition presents no basis for the exercise of this Court's discretion. The *PENNSYLVANIA* Rule shifts the burden, to one who is in actual violation of a statutory rule intended to prevent collisions, to rebut a presumption of fault by proving that such violation could not have been a proximate cause of the accident. Where, as here, there has been no statutory violation, the *PENNSYLVANIA* Rule is inoperable

International Rule 5, 33 U.S.C. §1602 (*supra*, p. 1) was not violated by LARRY AND MABEL II. Rule 5 does not require the posting of an outside lookout irrespective of the sea and weather conditions. The determination that the wheelhouse position and the visibility afforded Captain Sheppard was as good as anybody who could have been posted elsewhere as a lookout, and that posting a lookout forward or atop would have been dangerous under the sea conditions, was based on facts uncontradicted in the Record and affirmed under the clearly erroneous standard of review. Accordingly, in the absence of a violation of Rule 5, the *PENNSYLVANIA* Rule cannot be invoked.

This case presents no basis for application of the *PENNSYLVANIA* Rule - *a fortiori* it presents no basis for resolving an alleged conflict between circuits as to the applicability or validity of the *PENNSYLVANIA* Rule.

ARGUMENT

THE OPINION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH *THE STEAMSHIP PENNSYLVANIA v. TROOP*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874). IN THE ABSENCE OF A STATUTORY VIOLATION THE *PENNSYLVANIA* RULE CANNOT BE INVOKED. THE DETERMINATION OF A STATUTORY VIOLATION IS A QUESTION OF FACT FOR THE DISTRICT COURT UNDER THE TERMS OF THE PARTICULAR STATUTE INVOLVED AND THAT DETERMINATION IS NOT TO BE DISTURBED UNLESS CLEARLY ERRONEOUS.

The assertion that this case somehow presents a conflict with the procedural and evidentiary rule enunciated in *The Steamship PENNSYLVANIA v. Troop*, 86 U.S. (19 Wall.) 125, 22 L.ed. 148 (1874), and the myriad other decisions cited in the Petition which have followed and/or applied the *PENNSYLVANIA* Rule since its inception, is without legal or factual foundation. Neither the District Court's Memorandum decision nor the Circuit Court's Per Curiam affirmance represent any jeopardy to the *PENNSYLVANIA* Rule. Petitioners lose sight of the fact that this Court does not exist as a "super" appellate court, nor are the United States Courts of Appeals to be utilized as mere way stops on the road to the Supreme Court.[5]

As this Court has time and again admonished, its certiorari jurisdiction with respect to conflict claims is meant to settle "real and embarrassing" conflicts between the Circuits involving principles ". . . which [are] of importance to the public as distinguished from that of the parties." *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.ed. 712, 714 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70,

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5/ *See e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.ed. 672, 677 (1948); *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.ed. 413 (1923).

79, 75 S.Ct. 614, 99 L.ed. 897, 904 (1955). This Court does not grant certiorari to review evidence and discuss specific facts, especially when the facts which control are subject to the clearly erroneous rule and are of importance only to the specific litigation.[6]

As with *Southern Power Co. v. North Carolina Public Service Co., supra,* the allegedly grave question presented by the issue stated in the Petition does not exist. Petitioners, by a selective presentation of facts and a selective quoting of a portion of the Memorandum findings and decision of the District Court (PA. 4a - 16a), out of context, allege a finding by the Trial Court of a violation of International Rule 5, 33 U.S.C. §1602 (*supra,* p. 1), in order to assert that the *PENNSYLVANIA* Rule has been violated.[7]

The *PENNSYLVANIA* Rule requires first that there be an "...actual violation of a statutory rule..."[8] before the presumption of fault arises and the burden of proving the violation could not have been a cause is shifted. In *Richelieu and Ontario Navigation Company v. The Boston Marine Insurance Company,* 136 U.S. 408, 422, 10 S.Ct. 935, 34 L.ed. 398, 403

6/ *United States v. Johnston,* 268 U.S. 220, 45 S.Ct. 496, 69 L.ed. 925 (1925); *Rudolph v. United States,* 370 U.S. 269, 8 L.ed.2d 484, 82 S.Ct. 1277 (1962); *Southern Power Co. v. North Carolina Public Service Co., supra; N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.ed. 479, 482 (1951).

7/ *Had* the District Court found a violation of Rule 5, the statement of Respondent's Counsel in the Appendix to the District Court's Memorandum Decision (PA. 13a), that it was Defendants' (Petitioners here) burden "...to also establish that such failure contributed to the collision", might have been actionable error. The selective editing of the Memorandum findings of the District Court in the Petition to this Court, to assert a factual finding by the District Court of the *statutory* failure to post a lookout when it clearly made no such findings, as Petitioners admitted in their Reply Brief in the Eleventh Circuit, renders the erroneous statement of the burden totally inconsequential with respect to the actual issue and facts confronting the District Court and the Court of Appeals. In the absence of an initial statutory violation, necessary to invoke the *PENNSYLVANIA* Rule, the erroneous statement is harmless. *See, Candies Towing Co., Inc. v. M/V B & C ESERMAN,* 673 F.2d 91, 95 (5th Cir. 1982).

8/ 86 U.S. (19 Wall.) at 136; 22 L.ed. at 151.

(1890), the term "positive breach of statute" was used. It is not a rule of liability, it only shifts the burden of proof as to causation. *E.g., The AAKRE*, 122 F.2d 469 (2nd Cir. 1941), cert. denied, sub nom. *Waterman v. The AAKRE*, 314 U.S. 690, 62 S.Ct. 360, 86 L.ed. 552 (1941); *Green v. Crow*, 243 F.2d 401 (5th Cir. 1957); *Orange Beach Water, Sewer and Fire Protection Authority v. M/V ALVA*, 680 F.2d 1374 (11th Cir. 1982); *Florida East Coast Railway Company v. Revilo Corporation*, 637 F.2d 1060 (5th Cir. 1981).

The determination of whether or not a statutory fault has occurred, as a necessary prerequisite for application of the *PENNSYLVANIA* Rule burden, is a question of fact to be decided by the District Court under the particular circumstances of each case. Upon review the findings are subject to the clearly erroneous doctrine. *E.g., Oriental Trading and Transport Co. v. Gulf Oil Corporation*, 173 F.2d 108 (2nd Cir. 1949), cert. denied, sub nom. *Gulf Oil Corporation v. The JOHN A. BROWN*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.ed. 1728, (1949); *The First National Bank of Chicago v. Material Service Corporation*, 597 F.2d 1110, 1116 (3rd Cir. 1979); *Osaka Shosen Kaisha, Ltd. v. Angelos Leitch & Co., Ltd.*, 301 F.2d 59 (4th Cir. 1962); *Wilson v. Oil Transport Company, Inc.*, 242 F.2d 727 (5th Cir. 1957), cert. denied, 355 U.S. 835, 78 S.Ct. 56, 2 L.ed. 2d 46 (1959); *China Union Lines, Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), cert. denied, 386 U.S. 933, 87 S.Ct. 955, 17 L.ed.2d 805 (1967); *Orange Beach Water, Sewer and Fire Protection Authority v. M/V ALVA, supra; see also, United States v. Adams*, 376 F.2d 459 (3rd Cir. 1967).

Whether or not there has been a statutory violation depends upon the facts of the particular case measured against

the particular statutory rule at issue.[9] Rule 5 (*supra*, p. 1) is not, by its very wording, a command to post a lookout on the bow or outside under *all circumstances*. It does require a lookout "...appropriate in the prevailing circumstances and conditions...". The present Rule, enacted in 1972, is far more definitive than former Rule 29. Even under former Rule 29 as held in *Darling v. Scheimer*, 444 F.2d 514 (9th Cir. 1971), the lookout duty does not apply "...under any and all circumstances". The Court there held, in a collision case, that there was no statutory duty to post a lookout on boats of a fishing fleet which had shut off their engines for the night and were drifting 35 miles off the coast in open seas. The boats had mast lights and side navigation lights burning on a clear moonlit night with 6 to 10 mile visibility in a flat calm, offering a clear view to others.[10]

9/ While COVE RANGER'S failures are not directly here at issue, the Petition's preoccupation with the "stand-on" and "give-way" situation is presented in a factual vacuum which ignores the COVE RANGER'S many failures (PA. 6a) which were governed by Rules 7(a), (c) and (d), 8(a), (c) and (e), 17 and 34(a) and (d), International Regulations for Preventing Collision at Sea (1972), 33 U.S.C. §1602. As governed by these and other regulations, and as held by the District Court (PA. 6a), no vessel has the right to insist upon the "right-of-way into collision." *E.g., Crawford v. Indian Towing Company*, 240 F.2d 308, 311 (5th Cir. 1957), cert. denied, 353 U.S. 958, 77 S.Ct. 865, 1 L.ed.2d 909 (1957). The United States Coast Guard's Comment to Rule 17 ("stand on"/"give-way" vessel) states:

> The "privileged vessel" is now defined as "stand-on vessel." Provision is now made for the stand-on vessel "to avoid collision by her maneuver alone". Provides for maneuver by the stand-on vessel based upon his own capabilities, rather than his assessment of the "give-way" vessel's capabilities. A significant reform of the rule that allows action by the "stand-on vessel" prior to the "in extremis" situation.
>
> [United States Coast Guard Publication, Navigational Rules, CG-169 (May 1, 1977), p. 21]

10/ Former Rule 29, International Rules for Navigation at Sea, Act Oct. 11, 1951, c. 495, §6, Part D, 65 Stat. 419-420, repealed, Pub. L. 88-131, §3, 77 Stat. 194, provided:

> Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Historically, weather and sea conditions have been primary factors in determining whether or not there has been a violation of the lookout duty, statutory or otherwise. The decision is committed to the captain of the particular vessel under the conditions being encountered by the vessel. *E.g., The KAISERIN MARIA THERESA*, 149 F. 97 (2nd Cir. 1906), cert. denied, sub nom. *Palson v. North German Lloyd*, 204 U.S. 671, 27 S.Ct. 786, 51 L.ed. 673 (1907), (removal of bow lookout due to coldness of weather and freezing of spray); *The CARO*, 23 F. 734 (E.D. N.Y. 1884) (a lookout kept from pilot house 15 feet from the bow, when man if placed on bow would have been in danger of being washed over, is not a fault); *Boston Maritime Corporation v. Ocean's S. Co. of Savannah*, 17 F.2d 804 (D.C. Mass. 1927) (steamship not at fault because of having placed lookout in bow where wind and spray interfered with his ability to see in heavy weather); *Wood v. United States*, 125 F.Supp. 42, 51 (S.D. N.Y. 1954) (recognizing the weather exception to the duty of a bow lookout under former Rule 29); *La InterAmericana, S.A. v. Narco*, 146 F.Supp. 270, 273 (S.D. Fla. 1956), rev'd on other grounds, sub nom. *Nardelli v. Stuyvesant Insurance Company of New York*, 258 F.2d 718 (5th Cir. 1958), modified on other grounds, 269 F.2d 592 (5th Cir. 1959) (recognizing that statute does not invariably demand a separate lookout on bow and the conditions of sea and weather can excuse necessity for separate lookout). As stated in *Oriental Trading & Transport Co. v. Gulf Oil Corporation, supra*, at 111:

> Although a lookout is one of the most essential safeguards on a ship, nothing could less insure his value than rigidly to circumscribe his functions. Normally, he would indeed be stationed in the bow; because there his view is not obstructed, and apparently he can see better when close to the water than aloft. However, all considerations yield, when the weather makes another position more suitable. It would be fatuous to the last degree to insist upon his being on the forecastle, where rain or sleet or even high winds in his face interfere with his vision. Both ships were sheltering their lookouts - a good indication that that was a reasonable precaution.

Here the District Court found that there was no violation of Rule 5 by maintaining a lookout from the wheelhouse, due to the dangerous conditions represented by the sea in relation to a small fishing vessel which was pitching and rolling and taking water over her bow. As the evidence fully supported, as admitted in the Petitioners' Reply Brief in the Eleventh Circuit, positioning a lookout atop the wheelhouse or on the bow would have been dangerous. Apart from the fact of a guaranteed impairment of his vision by wind and constant salt water, *see, Boston Maritime Corporation v. Ocean's S. Co. of Savannah, supra,* a man posted on top of the wheelhouse or in the bow would have been fully occupied in trying to keep from going over the side as the trawler pitched and rolled and shipped water. It was uncontradicted that under the sea conditions facing LARRY AND MABEL II the wheelhouse was the only available position, and that Captain Sheppard's visibility was as good as anyone he could have posted. (TR. 57). The situation here was not any different than that in *The CARO, supra.*

Petitioners' assertion that the District Court found a statutory violation of Rule 5 and failed to apply the procedural requirements of the *PENNSYLVANIA* Rule is without merit. The procedural and evidentiary mandates of the *PENNSYLVANIA* Rule never arose because of the absence of proof of a statutory violation necessary to the invocation of the *PENNSYLVANIA* Rule. This was a necessary preliminary factual determination subject to the clearly erroneous standard, which Petitioners admit was fully supported by the Record.

Petitioners seek to use this Court only as a second appellate body to review an issue of fact. The decision below has neither eroded nor affected the *PENNSYLVANIA* Rule and is not in conflict with decisions from other Circuits.

CONCLUSION

The *PENNSYLVANIA* Rule is alive and well in the Eleventh Circuit; the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 82-1583

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

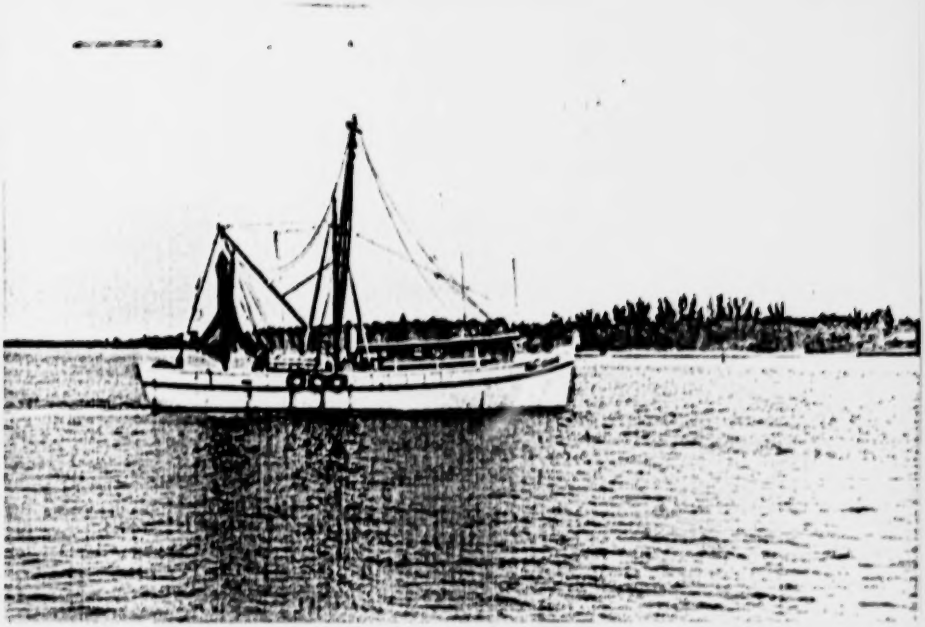
S/S COVE RANGER, her engines tackle, boilers, equipment, furnishings *in rem*, COVE SHIPPING COMPANY, INC., C. M. C. TANKERS and C. T. S. ASSOCIATES, *in personam*,
Petitioners,

v.

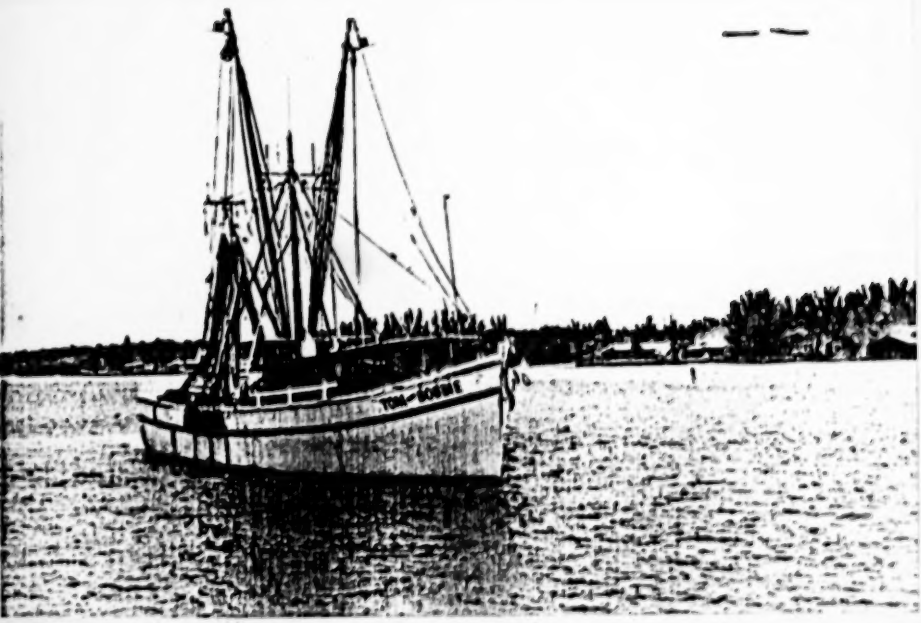
ST. GEORGE PACKING COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO BRIEF FOR RESPONDENT, ST. GEORGE PACKING COMPANY, INC., IN OPPOSITION



Plaintiff's Exhibit 7



Plaintiff's Exhibit 8